OPINION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

In the Court of Appeal of the State of California, Second Appellate District, Division Two.

2nd CRIM. No. 12576.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. EARL SPIGNER, Defendant and Appellant.

Filed June 27, 1967.

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APPEAL from a judgment of the Superior Court of Los Angeles County, Howard D. McClain, Judge. Affirmed as modified.

Marks & Schneider and Burton Marks for Defendant and Appellant.

Thomas C. Lynch, Attorney General, Doris H. Maier, Assistant Attorney General, Raymond M. Momboisse, Deputy Attorney General, Daniel J. Kremer, Deputy Attorney General, and David R. Pigott, Deputy Attorney General, for Plaintiff and Respondent.

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Defendant appeals from the judgment entered against him following a nonjury trial that resulted in his conviction of the crimes of burglary and conspiracy to commit burglary. Although the judgment entered in the minutes fails to so indicate, the trial judge expressly stated that he was aware that Penal Code, section 654, would preclude punishing appellant upon both convictions and therefore ordered that the sentence imposed on the conspiracy count be suspended. Such procedure is proper. (*In re Wright*, 65 A.C. 698, 703,

fn. 4.)

By way of assignment of error appellant contends that (1) he did not "personally submit his case upon the Preliminary Transcript," and (2) that "the evidence is not sufficient to connect him to the crimes alleged in the information." We have concluded that neither contention is meritorious.

The reporter's transcript of the proceedings on March 22, 1966, reflects appellant's personal waiver of his right to a jury trial and the court's minutes for that date read as follows:

"By stipulation of all counsel the cause is submitted on the testimony contained in the transcript of the proceedings had at the preliminary hearing, subject to this Court's rulings, with each side reserving the right to offer additional evidence, and all stipulations entered into at the preliminary hearing be deemed entered into in these proceedings. It is further stipulated that any exhibits received at the preliminary hearing are deemed received in evidence in these proceedings, subject to this Court's ruling."

It has been repeatedly held in California that a defendant need not join in such a stipulation personally so long as he is aware thereof and offers no objection thereto. (*People v. Andrews*, 234 Cal. App. 2d 69, 77-79, and the many cases cited therein.)

The verity of the minutes regarding the stipulation and the fact that appellant himself was aware of the stipulation and offered no objection thereto is confirmed by the following dialogue between the court and appellant's counsel in his presence at the continued hearing on April 21, 1966, reflected in the reporter's transcript of the trial proceedings conducted on that date:

"THE COURT: We will call the Earl Spigner matter at

this time. MR. YOUNGQUIST: The People are ready. MR. LENOIR [counsel for appellant]: The defendant is ready. THE COURT: The record will show that I have received the Preliminary Transcript, which I have read and considered in accordance with our previous stipulation. Mr. Lenoir, did you want me to return your copy at this time or do you need it? MR. LENOIR: I do not particularly need it." Thereafter, full stipulations designed to shorten the time of trial were entered into and further evidence was introduced by both the prosecution and the defense. At no time did appellant offer any objection to this procedure and tacitly acquiesced therein. We find no error and certainly none that appellant may urge for the first time on appeal.

The evidence, as appellant concedes, conclusively establishes that a major burglary was committed at a Von's Shopping Bag store on the night of April 18, 1965, or during the early morning hours of April 19, 1965. Virtually unimpeachable physical evidence demonstrates that appellant's brother-in-law, Charles Hays, and two other men used two rented trucks to transport various items, including a safe containing approximately $25,000, that had been taken from the premises. One of these trucks had been rented by Hays on the morning of April 19, 1965, but his attempt to rent the other on the preceding day, April 18, 1965, had been frustrated by his inability to produce adequate identification. Appellant rented this second truck between a half hour and an hour and a half after his brother-in-law's effort so to do had failed. Paint and wood specimens established that these trucks had been used in transporting the stolen equipment and an eye witness had identified them after seeing three men abandoning the broken safe on the morning of April 19, 1965. This

witness was able positively to identify the trucks but not the three men he had seen using them. However, appellant personally returned the truck he had rented later that morning.

Upon a search incident to the arrest of co-defendant, Charles Hays, there was seized: ten books of Bank of America Travellers' Checks of denominations ranging from $20 to $50 to $100 which were bought on April 22, 23, and 25, 1965, at two different branches of the Bank of America, the total value of the checks being $3,700; two dealer's safe manuals, a Star safe manual and a Schwab safe manual found under Mr. Hays' bed; plane tickets from Los Angeles to San Francisco and from San Francisco to Los Angeles made out to Mr. and Mrs. Charles Hays, bearing the dates April 23 on the tickets to San Francisco and April 26 on the return trip; a shaving kit containing $296 in $1 bills; coins in a trunk in the amount of $239.89; a length of chain in the trunk of a Buick car registered to Charles Hays; a man's blue suit and a pair of brown shoes from a closet in the residence in which Hays was arrested; and a page from a telephone book with the heading "markets" in the trunk of a 1965 Mustang registered to Charles Hays found parked in front of Hays' residence.

Tar chips from the ceiling of the market where entry had been made through a hole cut therein, matched tar fragments found in the cuffs of the blue suit seized incident to the arrest of appellant's brother-in-law. Yellow and blue paint chips from the chain found in Hays' automobile matched paint samples taken from the yellow and blue trucks used in the burglary. Fibres taken from a tree branch found with the abandoned safe and from the blue suit and the shoes seized on Hays' arrest, were the same as fibres taken from a multicolored blanket that had been removed from the burglarized

store.

Appellant testified that "one of his sisters" had told him on some unspecified date following the burglary that a warrant was outstanding for his arrest in connection therewith, i.e., he was told the "details as to who wanted [him] and why." Nonetheless, allegedly upon advice of counsel, appellant determined not to surrender himself or to otherwise communicate his innocence to the police but simply to avoid apprehension in order to "let the case develop."

Appellant ultimately was apprehended in an area where there had been a recent increase in burglaries. The police had stopped a car in which appellant was a passenger for routine investigation into the cause of the "apparent nervousness of the driver" and the fact that the rear seat was "loaded with what appear[ed] to be clothing." Appellant had falsely identified himself as Herman Earl Brown and exhibited a temporary interim driver's license which he had obtained in that name.

On direct examination appellant testified that the reason he had applied for a driver's license under an assumed name was that his own license had been suspended prior to the burglary involved in the instant case and he "had to have a driver's license in order to get a job." He further testified that he had denied his true identity because "That was on the I.D. I had on me at the time and at the time they arrested me was supposed to be for a robbery suspect." However, on cross-examination the following questions and answers were given:

"Q. Then you knew there was a warrant for Earl Spigner when you were stopped by the Los Angeles Police Department; is that correct? A. Yes, I did. Q. In spite of that, you presented a driver's license with a name of Herman Earl Brown on it,

sir? A. Yes. Q. Did you ever tell the police that you were Earl Spigner before they identified you and told you you were Earl Spigner, sir? A. No. Q. *Is that because you did not want to get caught, sir? A. Well, [you] might say that. My attorney advised me to do that, let the case develop.*" (Emphasis added.) Subsequently the prosecution established that contrary to his testimony, appellant's own driver's license was valid until October 11, 1965, some five months after his arrest and six months after the commission of the burglary for which he was convicted.

In connection with his alleged inability to find full time work because of the loss of his driving privilege prior to the instant burglary, appellant was asked how it was that he had been able to buy a new Cadillac. Appellant replied that although he had filled out the credit application and taken title to the car in his name, he actually was merely acting as agent for an undisclosed principal, one Bobby Boyd, who was unable to effect the purchase directly by reason of his status as a parolee. Appellant testified that he did not know whether or not this Bobby Boyd was "the fellow that has the joint bank account with Charles Hays," but when asked if Boyd was a good friend of his brother-in-law he replied: "Well, he is a relative of mine; . . . [a] cousin by marriage."

By way of defense appellant testified that he indeed had rented the truck used in the robbery but had done so merely to aid a friend, Vernon Brown, who was moving that day and who did not have a driver's license. He asserted that he had merely rented the truck in his own name and then delivered it to Brown and returned home. He stated that he was advised by telephone the following day where to pick up the truck and he had done so and returned it to the rental agency. He had

been unable to locate Brown thereafter and until the day of trial had never told the police or anyone else that such a person existed and had not sought help in locating him. Appellant admitted that he had previously been convicted in the federal courts for the crime of smuggling.

Appellant's mother was called to supply partial corroboration to appellant's alibi. She testified that although the trial was held more than a year after the commission of the robbery, she could remember that her son had been at home all that day except between the hours of 1 to 5 p.m. She asserted that she could remember the events of the day although she had not had occasion to recall it until appellant's attorney called it to her attention a week before the trial because one of her grandchildren had begun "running a temperature" on April 18, 1965. She offered no explanation for how she was able to remember that the child was ill on these particular dates since, although she has a calendar on which she keeps records, she didn't "particularly put that on there." In addition, although she testified that she remembered seeing her son watching television after dinner on the evening of April 18, 1965, she gave no testimony relating to her knowledge of his whereabouts during the late hours of the night and the morning of the 19th during which the burglary apparently occurred.

Insofar as appellant's defense was based upon an alibi, it is immediately apparent that his contention regarding the sufficiency of the evidence presents nothing for appellate review. As stated in *People v. Johnson,* 210 Cal. App. 2d 273, 276: "Each defendant called several witnesses in his behalf in an attempt to establish an alibi. It is apparent the [trier of fact] did not believe these witnesses or the defendants' version of where they were at the time of the commission of the

[burglary]. 'The weight to be given to the testimony of the witnesses, whether in support of an alibi or otherwise, and their credibility, present questions for the determination of the [trier of fact] which is binding upon this court on appeal. [Citation.]' " (See also *People v. Williams,* 53 Cal. 2d 299, 303; *People v. Pshemensky,* 244 A.C.A. 183, 186.)

Similarly unmeritorious is appellant's contention that the evidence is insufficient since it is entirely circumstantial and "such evidence to sustain conviction must not only be consistent with guilt but inconsistent with innocence." This contention demonstrates a failure to grasp the essential and basic difference in the functions performed by the trial and appellate courts. "It is the trier of fact, not the appellate court, that must be convinced of a defendant's guilt beyond a reasonable doubt. If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment. [Citations.]" (*People v. Robillard,* 55 Cal. 2d 88, 93.)

"Nor is it necessary 'in order to establish the defendant's guilt, that any of the witnesses should have actually seen him break and enter the premises, or should have seen him in the vicinity of the premises about the time the burglary was committed. It rarely happens that an offense, like that here complained of, can be proved by witnesses who saw and recognized the defendant in the act, and resort must, therefore, ordinarily be had to circumstantial evidence.' [Citation.] " 'In a prosecution for burglary the evidence on which a defendant is convicted may be purely circumstantial and if substantial, as in the present case, is sufficient to

support the judgment of guilty.' [Citations.]" (*People v. Murphy*, 173 Cal. App. 2d 367, 373.)

We agree with respondent's statement that "The physical evidence, the closeness of family relationship between appellant, co-defendant, and alibi witness, the patently unconvincing alibi as to use of the truck and presence at the time of the burglary, coupled with his guilt-reflecting acts upon being arrested more than justify the conclusion that appellant is guilty of the offenses charged."

The judgment is modified to reflect the fact that execution of the sentence imposed on Count I, conspiracy, was suspended, and as so modified it is affirmed.

HERNDON, J.

We concur:

ROTH, P.J.

FLEMING, J.

THE COURT: This opinion is not for publication pursuant to the provisions of Rule 976, California Rules of Court.

DENIAL OF PETITION FOR HEARING IN SUPREME COURT OF CALIFORNIA

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

SEP 21 1967

DEAR SIR: *I have this day filed Order*

HEARING DENIED

In re: 2 Crim. No. 12576

People

vs.

Spigner

Respectfully

WILLIAM I. SULLIVAN
Clerk

67543-877 3-66 2500 OSP

APPENDIX "B"

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

MINUTES

Department No. EAST A

MAR 22 19 66 Present Hon. Howard D.McClain Judge

Case No. 308005

THE PEOPLE OF THE STATE OF CALIFORNIA

vs.

X EARL SPIGNER

APPEARANCES:
(Parties and Counsel checked if present. Counsel shown opposite parties represented.)

X Evelle J. Younger, District Attorney, by Q Clifton Deputy

X E. J. Hovden, Public Defender, by G. Lenoir Deputy

Cause called for trial. The defendant(s) personally and all counsel waive jury trial.

By stipulation of all counsel the cause is submitted on the testimony contained in the transcript of the proceedings had at the preliminary hearing subject to this Court's rulings, with each side reserving the right to offer additional evidence, and all stipulations entered into at the preliminary hearing be deemed entered into in these proceedings.

It is further stipulated that any exhibits received at the preliminary hearing are deemed received in evidence in these proceedings, subject to this Court's ruling.

Continued to April 20, 1966 at 9:30 AM. Bail.

APPENDIX "C"

UNITED STATES CONSTITUTION

VI AMENDMENT:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

XIV AMENDMENT:

All persons born or naturalized in the United States, and subject to the jurisdiciton thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
County of Los Angeles)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Los Angeles, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 215 West Fifth Street, Los Angeles, California 90013, that on December , 1967, I served the within Petition For Writ of Certiorari (Spigner v. People of the State of California) on the following named parties, by depositing a copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Los Angeles, California, addressed to said parties at the addresses as follows:

Attorney General
State of California
600 State Building
Los Angeles, California 90012

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December , 1967, at Los Angeles, California.

_____

Subscribed and sworn to before me
this day of December, 1967

_____

Notary Public in and for the
State of California.

Orig. + 40 cys. lodged with United States Supreme Court

DEAN-STANDEFER, 215 W. 5th St., Los Angeles 90013